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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 465.

IRA S. BUSHEY & SONS, INC., Employer and THE STATE INSURANCE FUND, Insurance Carrier,

Petitioners,

v.

FRANK A. CARDILLO, Deputy Commissioner, Second Compensation District, THORLEIF JOHANSEN, Claimant, AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or AMERICAN MUTUAL LIABILITY INSURANCE COMPANY and HARTFORD ACCIDENT & INDEMNITY COMPANY, Insurance Carriers,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	5
Conclusion	19
Appendix A—Statutes	20
Appendix B—Opinion and Judgment Below	22

CITATIONS

Cases:

A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495, 529	8, 10
Amy v. City of Watertown, 130 U. S. 320, 324	11
Christensen v. United States, 2 Cir., 194 F. 2d 978	10
Chung Fook v. White, 264 U. S. 443, 445	12
Crooks v. Hanelson, 282 U. S. 55, 60	12
Donahue, In re, 198 N. E. (Mass.) 149	7
Guessefeldt v. McGrath, 342 U. S. 308, 321	9
Hollins, In re, 2 Cir., 229 F. 349, certiorari denied 36 S. Ct. 448	11
Jacone v. Cardillo, 2 Cir., 208 F. 2d 696	5
Marhoffer v. Marhoffer, 220 N. Y. 543, 548	6
McNeelly v. Sheppard, 5 Cir., 89 F. 2d 956	13

PAGE

Milwaukee v. Industrial Commission, 263 N. Y. 662 .. 7

Mutual Film Co. v. Industrial Commission, 236 U. S. 230 14

Newcomb v. Burbank, 2 Cir., 181 F. 334 11

New York Central R. R. Co. v. White, 243 U. S. 188 .. 10

Panama Refining Co. v. Ryan, 293 U. S. 388 8

Peters v. United States, 8 Cir., 20 F. 2d 741 10

Petrie, Matter of, 215 N. Y. 335 6

Pillsbury v. United Engineering Co., 342 U. S. 197, 199 .....9, 10, 11, 12

Runnels v. Allied, 270 Mich. 153 7

Schurick v. Bayer Co., 272 N. Y. 217, 220 6

Thomas v. Radio, 2 La. App. 554 7

Voris v. Eikel, 5 Cir., 200 F. 2d 724 11

Western Union Tel. Co. v. Myatt, Cir. Kan., 97 F. 335 10

Wright v. Cane Run, 90 S. W. 2d (Ky.) 36 7

Statutes:

Constitution of the United States:

Article 1, Section 1 8

Article 1, Section 8, Par. 18 8

Amendment V 18

Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424:

33 U. S. C. 902(2) 9

33 U. S. C. 902(10) 5, 9

33 U. S. C. 903, Par. A 5

PAGE

Miscellaneous:

33 Fourth Decennial Digest:

Secs. 3 and 6, Workmen's Compensation 7

Larson, Workmen's Compensation:

Sec. 2.40 5

Sec. 57.00 7

New York State Workmen's Compensation Act:

Article 3 13

Section 37 12

Pollack, J., Workmen's Compensation for Railroad Work, Injuries and Diseases:

36 Cornell Law Quarterly 236 10

Schneider, W. R., The Law of Workmen's Compensation, 2d Edition:

See 398, p. 1328, Vol. 2 ..... 7, 10

Willis' Workmen's Compensation Acts, ed. 31 (1938) 13

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the mandate of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 19, 1955.

Citations to Opinions Below

The opinion of the District Court, printed in the Record of the court below, at pages 30a-33a, is unreported. The opinion of the United States Court of Appeals for the Second Circuit, made a part of the Record in the Court below, is unreported to date and appears in Appendix B hereto, *infra*, pages 22-39.

Jurisdiction

The Judgment of the United States Court of Appeals for the Second Circuit was entered on July 19, 1955, Appendix C, *infra,* pages 40, 41. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

1. Where there admittedly was no impairment of wage earning capacity, was the award to claimant Johansen for a partial loss of hearing contrary to law as enacted by the Congress and therefore illegal and void.
2. Where the only provision relating to occupational disease is contained in the definition of injury so as to include occupational disease, thus leaving it entirely to the deputy Commissioners to determine what an occupational disease is; when it arises; in whose employ the disablement occurred, without any statutory rules or guides of conduct is an unlawful delegation of legislative power.
3. Did the decision of the court below holding liable the carrier who last insured the "liable" employer to the exclusion of two other carriers for the same employer deprive said last carrier of its constitutional rights under its contract of insurance in direct violation of the provisions of the Constitution of the United States.

Statute Involved

The statutory provisions involved are in the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 902, Pars. 2, 10;

Figures in Parenthesis refer to page in Certified Record.

33 U. S. C. 903, Par. a; Article 1, Section 1 and Article 1, Section 8, Par. 18 of the Constitution of the United States and Amendment V of the Constitution of the United States. They are printed in Appendix A, *infra,* pages 20, 21.

Statement

In the first instance, an order was filed by Deputy Commissioner Cardillo on July 2, 1954. The order was allegedly made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C., secs. 901, *et seq.,* wherein claimant-respondent's claim for a compensation award was granted and an award was made against the employer, Ira S. Bushey & Sons, Inc., and its three insurance carriers, American Mutual Liability Insurance Company, Hartford Accident and Indemnity Company and The State Insurance Fund. The award specifically provided that the aforementioned carriers shall be jointly, severally and equally liable for the award granted (12a).

The award herein was made by the Deputy Commissioner upon his Finding that as a result of claimant's employment he sustained an *injury, occupational in character, consisting of a permanent disability.* This alleged disability was found by the Commissioner to be a 13.8% binaural loss of hearing (11a).

The period of employment, covered by the three insurance carrier appellants indicates the following:

(a) September 16, 1942 to June 1, 1953—3911 days—97.34% of the total employment period with American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company;

(b) June 1, 1953 to September 9, 1953—100 days—2.49% of the total employment period with Hartford Accident & Indemnity Company;

(c) September 9, 1953 to September 16, 1953—7 days —.17% of the total employment period with The State Insurance Fund.

The total number of days employed was 4018 (10a).

The record discloses without dispute that the claimant lost no time from his work (58a). Claimant's own physician testified that the hearing loss existed in 1950 prior to the State Insurance Fund coverage (66a, 67a). The claimant was not in any way disabled industrially (73a). To the same effect another doctor testified that there was no industrial disability (96a).

Deputy Commissioner Cardillo made the award appealed from on the ground that "the last employer in whose employment claimant was continuously exposed for eleven years is liable for the payment of compensation" and "that the insurance carriers above named who successively covered such liability of the employer during the period of claimant's last employment, are jointly, equally and severally responsible * * *" (11a).

Pursuant to the provisions of Section 21 of the Act, *supra,* there was filed and served a joint bill of complaint in equity for the purpose of reviewing the decision and the order entered by the said Deputy Commissioner on July 2, 1954 (2a to 8a incl.). After issue was joined (17a-20a incl.) motions for summary judgment were made by the defendants and cross motions for summary judgment were made by the plaintiffs. Argument was had, briefs were submitted and an opinion was handed down by Judge Robert A. Inch (30a-33a). An order was thereafter entered on January 5, 1955 wherein the motions of the defendants-respondents were granted, the complaint was dismissed and the cross motions of the plaintiffs were denied (21a. 22a).

It was from the above opinion and the order of January 5, 1955 entered thereon that the employer and its three carriers appealed to the Court of Appeals on January 21, 1955 (27a-29a incl.).

The court below affirmed the order of the District Court but remanded to that court with directions to fix the liability not only on the "last employer" but upon the "last carrier". The other two carriers were relieved from all liability. The "Last Carrier" is the petitioner, The State Insurance Fund.

Reasons for Granting This Writ

I. The Deputy Commissioner's Award, the affirmance thereof and its remanding are illegal and void. The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901, *et seq.*, was specifically enacted to provide compensation for injury claims for *disability** (33 U. S. C. A. 903), Appendix A, *infra,* page 20. This section states that "Compensation shall be payable * * * in *respect of disability.*" The word disability is expressly defined and the Act states that " 'Disability' means incapacity because of injury to *earn the wages* which the employee was receiving at the time of injury in the same or any other employment" (33 U. S. C. A. 902 [10]), Appendix A, *infra,* page 20. The basis for any award under the statute is the wage-earning concept, "which is the only principle that holds Compensation Law together as a consistent whole." *Iacone* v. *Cardillo,* 2 Cir., 208 F. 2d 696. Yet, the record herein does not disclose nor even infer that the claimant lost the use of his ears to the detriment of his wage earnings.

Larson on Workmen's Compensation says that:

> "In compensation, unlike tort, the only injuries compensated for *are those* which produce *disability* and thereby presumably affect earning power." (Sec. 2.40)

* All italics supplied.

The undisputed facts, and they are admitted by everyone, are that the claimant has not lost any of his wage earning capacity either in his present employment nor in any other type of employment. As a matter of undisputed fact, the claimant is still working at his usual employment and at higher pay.

The award herein is a "schedule award." But schedule awards are not put up as a "price" on certain parts of the body.

> "The word 'disability' in the law as we read it therefore, means 'impairment of earning capacity' and not 'loss of a member'." See Matter of Marhoffer v. Marhoffer, 220 N. Y. 543, 548.

See also:

> *Matter of Petrie,* 215 N. Y. 335.

An existing disability is generally reflected in wage earning capacity. *Schurick* v. *Bayer Co.,* 272 N. Y. 217, 220.

Applying the definition of "disability", this claimant manifestly had no disability within the meaning and intent of the Act. *The Commissioner made no finding on the question when disability began.* The finding of a "permanent partial disability" by the Commissioner is completely against all of the admitted facts, contrary to specific law and is unjustified and unwarranted.

The court below construed the meaning of the word "disability" differently from the express definition and limitation of the Act and therefore was in violation of all of the accepted rules of statutory construction. It is for Congress to determine the definition as they explicitly did and not for the courts or commissioners to interpolate.

The language of the Act is plain and there is absolutely nothing in the Act to even suggest a contrary intention.

The power to remedy the situation rests solely with the Congress.

There is no evidence in this case that the claimant suffered a wage loss in the sense in which the term was intended by Congress to be used.

The present decision of the court below complained of is an attempt to get by construction what Congress did not give by specific enactment.

Under the legislative mandate the interpretation must be in accord with the meaning ascribed in the Statute.

See *Milwaukee* v. *Ind. Comm.*, 263 N. Y. 662.

The question herein is novel and of first impression.

Looking to the decisions of the courts in other jurisdictions to guide us, we find that they have held that compensation is not payable for an injury as such but is based on the loss of earning power, and that disability means incapacity or disability to work. In other words, impairment or lessening of earning capacity.

Fourth Decennial Digest, Vol. 33, Workmen's Compensation, Sections 3 and 6 and cases cited therein;
Wright v. *Cane Run,* 90 S. W. 2d (Ky) 36; 149 A. L. R. 413;
Thomas v. *Radio,* 2 La. App. 554;
Runnels v. *Allied,* 270 Mich. 153;
Re Donahue, 198 N. E. (Mass.) 149;
Schneider, W. R., The Law of Workmen's Compensation, 2d Ed., Vol. 2, Sec. 398, p. 1328;
Larson, The Law of Workmen's Compensation, Vol. 2, Ch. 10, Sec. 57, p. 1.

The decision of the Court of Appeals herein determines a most important question of law which never has been, but should be settled by this Court. The lower court's deci-

sion will affect every industry wherein noise emanates as a result of the work therein performed. It is a question national in scope and not confined to any one particular industry.

The Court of Appeals herein has so far departed from the existing statute and has sanctioned such departure by the Administrative Agency involved so as to call for an exercise of this Court's power of supervision.

The Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives" Article 1, Sec. 1, Appendix A, *infra*, page 21. And the Congress is empowered "To make all laws which shall be necessary and proper for carrying into Execution" its general powers. Article 1, Sec. 8, par. 18, Appendix A, *infra*, page 21. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, and its right to leave to selected instrumentalities the making of *subordinate rules only* within prescribed limits and the determination of facts to which the laws enacted by the Congress apply.

> *Panama Refining Company* v. *Ryan*, 293 U. S. 388; *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, 529.

Surely, the Congress never authorized nor intended for the Courts or any Administrative Agency to determine substantial rights such as the date of disablement, nor that there is such a thing as an "*injury occupational in character*," nor the right to change contracts entered into between parties.

This court in *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 199, said:

> "We are not free, under the guise of construction, to amend the statute by inserting therein before the word 'injury' the word 'compensable' so as to make 'injury' read as if it were 'disability'. Congress knew the difference between 'disability' and 'injury' and used the words advisedly. This view is especially compelling when it is noted that the two words are used in the same sentence of the limitations provision; therein 'disability' is related to the right to compensation, while 'injury' is related to the period within which the claim must be filed. Furthermore, Congress defined both 'disability' and 'injury' in the Act [Secs. 2 and 10], and its awareness of the differences is apparent throughout. Thus, we think that when Congress used 'disability' and 'injury' in the same sentence, making each word applicable to a different thing, it did not intend the carefully distinguished and separately defined words to mean the same thing. Congress meant what it said when it limited recovery to one year from the date of injury, and 'injury' does not mean 'disability' * * *".
>
> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes, but that does not give us the power to rewrite the statute * * *."

The above quoted sections are in Appendix A, *infra*, page 20.

See also:

Guessefeldt v. *McGrath*, 342 U. S. 308, 321.

Although a liberal and reasonable construction of the act is one thing and that reading language into it which

it does not contain or giving effect to it which its language does not permit is quite another.

Pillsbury v. *United Engineering Co.,* 342 U. S. 197;
Christensen v. *United States,* 2 Cir., 194 F. 2d 978.

This Court in the case of *New York Central R. R. Co* v. *White,* 243 U. S. 188, in upholding the constitutionality of the New York Act said that it was not unreasonable for the state, while relieving the employer from responsibility for damages measured by common law standards, "to require him to contribute a reasonable amount * * * *by way of compensation for loss of earning power incurred in the common enterprise* * * *."

Schneider, W. R. in The Law of Workmen's Compensation, 2d Ed. Vol. 2, Sec. 398, p. 1328, Thomas Law Book Company, St. Louis, Missouri, 1932, stated that "Disability or incapacity for work must be found to exist in order to justify a disability benefit award."

Pollack, a consultant to the C. I. O., described one of the objectives of the compensation system as providing medical care and cash payments "to restore the worker to health and *replace lost income*" (Pollack, J.: Workmen's Compensation for Railroad Work Injuries and Diseases, 36 Cornell Law Quarterly, 236, 1951).

The judicial power of the court below in the instant case is confined to its declaration of what the law is and not to declare what the law should be. This power is non-delegable and any attempt to do so is clearly illegal, void and unconstitutional.

It is established law that the only delegable powers are those that ascertain facts and to promulgate rules and regulations. Even in such instances the legislature declares the policy of the law and fixes the legal principles.

Schechter v. *U. S.,* 295 U. S. 495;
Peters v. *U. S.,* 8 Cir., 20 F. 2d 741;
Western Union Tel. Co. v. *Myatt,* Cir. Kan., 98 F. 335.

It follows, *after the law has been enacted,* the Administrative Agency (in this case the Labor Department) may in its reasonable discretion enforce such law under legislative standards.

We have substantial rights involved herein and there must be a law in existence before liability is determined.

Judicial authority is derived from the Constitution and the law made thereunder. Federal Courts are Courts of limited jurisdiction.

Newcomb v. *Burbank,* 2 Cir., 181 F. 334.

The Federal Courts must find their jurisdiction in express provisions of federal statutes and have only such powers as are expressly conferred upon them.

In re Hollins, 2 Cir., 229 F. 349, certiorari denied 36 S. Ct. 448.

This court said:

"The general rule is that the language of the act, must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it."

Amy v. *City of Watertown,* 130 U. S. 320, 324.

"Where the statutory language is clear, and unequivocal, there is no basis for arguing that it should be tortured or amended by judicial construction to bring about what the court might consider a more desirable result."

Pillsbury v. *United Engineering Co.,* 342 U. S. 197; *Voris* v. *Eikel,* 5 Cir. 200 F. 2d 724.

This court said in *Crooks* v. *Hanelson,* 282 U. S. 55, 60:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter."

It went on to say:

> "Laws enacted with good intention, when put to the test, frequently, and on the surprise of the lawmaker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

See:

> *Chung Fook* v. *White,* 264 U. S. 443, 445;
> *Pillsbury* v. *United Engineering Co.,* 342 U. S. 197.

If Congress intended other than what it had legislated, it would have so provided in plain and understandable words.

If the Labor Department herein finds it onerous or difficult it is their right to petition Congress for any changes and not act in any legislative capacity as it has done in this case.

Section 37 of the New York Workmen's Compensation Law defines disability in occupational disease cases as,

"the state of being disabled from earning full wages at the work at which the employee was last employed."

The New York Occupational Disease Law was patterned after the British Compensation Law which required as one of the conditions of obtaining compensation for an occupational disease, that the attending surgeon certify that the workman is suffering from one of the diseases of the act "and is thereby disabled from earning full wages at the work at which he is employed."

> *Willis' Workmen's Compensation Acts,* ed. 31, London, Toronto, Ont., and Bombay & Co., Ltd., (1938).

Yet the award herein for "disability" is the equivalent of health or life insurance. The courts have held that the law must not be so construed.

> *McNeelly* v. *Sheppard,* 5 Cir., 89 Fed. 2d 956.

It is an inevitable conclusion that if we ever cut loose from the earning capacity concept and start recognizing the principle that compensation is payable for physical impairment as such, we will have no way of knowing where the process will stop. The decision of the Court below may be very satisfying from an administrative point of view, yet we must take the Longshoremen's Act as we find it and as the Congress enacted it and we must leave it to the same Congress for its attention to any seeming inequalities or uneveness of coverage.

II. The Longshoremen's Act, here under consideration, approved March 4, 1927, was patterned after the New York Workmen's Compensation Law. The New York law at that time made specific provisions with respect to Occupational Diseases (Art. 3) defining disability as being disabled from earning full wages and fixing date

of disablement as fixed by the Industrial Board. It is clear that many of the provisions of the law relating to accidental injuries could not, did not and never was intended to apply to occupational diseases. Yet, in adopting the Longshoremen's Act the only reference to occupational disease is contained in the definition of the term "injury" as meaning accidental injury or death "and such occupational disease or injury as arises naturally out of such employment."

It is thus left to the deputy Commissioners to determine what an occupational disease is; when the date of disablement took effect and which employer shall be liable therefor. No rules of conduct or guides have been set up in the Longshoremen's Act as has been done in the New York Act and is done in the Compensation Acts of the various states. It requires no citation here that an occupational disease is a slow developing disease and may spread out over a man's entire occupational life under a number of employers. To give the deputy Commissioners power to determine all the requirements for compensation therefor without any guides is an unlawful delegation of the legislative power of the Congress (*Mutual Film Co.* v. *Industrial Commission,* 236 U. S. 230).

III. The decision of the Court below in holding The State Insurance Fund, the "last carrier", liable is not only against the undisputed evidence, but is not in accord with established law. It is an invasion of the right to private property, the cancellation and annulment of the right to contract and is not only illegal *per se* but unconstitutional.

The Court below admits by its very language that its decision was arbitrary. It violates the express provisions of the insurance contract and imposes liability not contemplated between the parties when the contract was entered into and is thus illegal and void. The method em-

ployed by the court below is a substitution of that court for the legislative branch of our government which is definitely denied by this court in its decisions.

No extended argument is required to show that the respective insurance carriers assumed their liability under express contract in which the time of commencement, as well as termination of liability, is clearly set out. It is elementary that by such policy of insurance, absent legislation to the contrary, the carrier assumes only such liability as accrues during its coverage period. The policy does not provide for the assumption of liability previously incurred, nor does it provide for the shifting of liability to its successor insurance carrier for liability accumulated during its own policy period.

Thus, the American Mutual was on the risk for *twenty-six* years, during eleven of which the claimant was in continuous employment and the alleged injury complained of came into being and almost developed to its fullest extent.

The Hartford Accident & Indemnity Company insured the liability of the employer for *four and one-half months* to the end of the period during which the Deputy Commissioner found the injury to have been incurred.

The State Insurance Fund was on the risk for only *seven days*.

The respective ratios of coverage are:

American Mutual	97.34%
Hartford	2.49%
State Ins. Fund	.17%

The judgment of the Court below holds the entire award chargeable against The State Insurance Fund, the petitioner herein.

The State Insurance Fund policy will be searched in vain for any provision whereby liability which has ac-

crued before inception of the policy is assumed with either the preceding or passed on to the succeeding carriers.

The action of the Court below in thus levying the award upon the "last carrier" amounts to a complete re-writing of the insurance contract, the inclusion of liability and obligations not contemplated when the contract was undertaken, as well as retroactive change of liability arbitrarily imposed by the Court below without the previous assent of the contracting parties having been obtained.

Nor must sight be lost of the fact that the policy involved herein is in standard form and, before adoption by the insurance industry, were submitted for approval to the various insurance departments and other government agencies having authority with respect thereto.

Contrary to the decision of the Court below the liability of the successive insurance carriers differs from that of the insured employer. Where, as in the case at bar, the employee has been working for one employer only, so that the initial exposure, as well as the ultimate inability to work, are all spanned by the one employment, the imposition of liability upon the employer follows readily. In such a case, the liability of the employer, *qua* employer, to pay compensation benefits is not open to question. However, when the employer, is insured by successive insurance carriers, the precise point at which liability arises must necessarily affect the several insurance carriers.

The problem is variously approached. Some States have solved this problem by arbitrarily fixing a date of disablement. These statutes usually provide, however, for proportionate contributions between the last and the preceding carriers. In such States, the scheme of compensation set up *in the statute* is read into the policy. *Consideration is*

always given to the fixing of the proportionate share to be charged against the several successive carriers. The limited liability assumed by the insurance contract is always respected. Whether the proportionate share of each carrier is determined in the award or provision is made for apportionment—contribution in a separate proceeding between the several carriers, total liability is never imposed upon one carrier without provision being made for an adjustment of the rights and equities between the previous or succeeding carriers.

This is the vice and the error in the decision of the Court below. Imposing liability on the "last carrier" may be common law liability in tort among joint tort feasors, but it is not compensation law. It is not provided for by the Longshoremen's Act either specifically or by inference. The illegality of the decision of the Court below is all the more glaring when it is remembered that the Longshoremen's Compensation Act contains no machinery for proceeding as it has. Moreover, the statute does not grant to the administrative tribunal equitable, or even quasi equitable, jurisdiction. The Deputy Commissioner and the Courts are bound by the statute and the insurance contract and they may not, whether for convenience or expediency, override either. Here, they have done just that.

It is no answer, that the problem of apportioning the liability among the several carriers is difficult. That the problem may not be easy of solution does not justify the act of the Court below. It is respectfully submitted that the imposition of the award as was done herein constitutes judicial legislation at its worst, is unsupported by even the remotest sanction of the statute, is directly contrary to established principles of insurance and contract law and arbitrarily imposes obligations and duties upon carriers not contracted for; it completely over-rides all legal and statutory safeguards. It, therefore, follows that the award,

cast in its present form, is illegal and void and must be reversed.

Yet the Court below adds to the problem by using expediency as the excuse to further confound a confused finding by the Commissioner. The evidence, as a matter of law, clearly demonstrates that the employee had no loss of hearing with the employer while The State Insurance Fund was on the risk. There are no clauses in its policy of insurance that provide or even contemplate that it would pick up a pre-existing liability of another carrier having already received its premiums for the present risk. Yet the payment of the award is being given to the carrier petitioner herein.

It seems self-evident that if there was no contraction or aggravation, the disease could not be chargeable to that period either against the employer or the carrier covering that period.

The evidence is clear and substantial in the instant case that there was neither a contraction or a related aggravation to the loss of hearing in the period of time that The State Insurance Fund was on the risk (66a, 67a, 92a, 105a, 106a).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively *by the statute,* and the *powers properly to be exercised* by the court are those only which are *expressly conferred* by the said Act.

The present decision is contra to the provisions of Amendment V to the Constitution in that it is a taking away of property unjustly and without due process, Appendix A, *infra,* page 21. We are told to pay for an alleged loss in excess of actuality and without basis in enacted law or decided cases.

We cannot conceive the unjust theory as herein administered. We are being held liable for an entire exposure on only a *7 day coverage* when all the evidence demon-

strates admittedly that the loss of hearing was an occupational fact *before we were even on the risk.*

Furthermore, it was never provided by Congress nor was it ever the Congressional intent to hold us liable under the circumstances herein.

Conclusion

This court can readily see that the questions involved herein are of utmost importance to the industries involved. It is novel and new and never before decided upon by this Court.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

Bernard Katzen,
Counsel for Petitioners.

October 7, 1955.

Appendix A

33 U. S. C. 902 (2)

Section 902, Par. 2:

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U. S. C. 902 (10)

Sec. 902, Par. 10:

" 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment".

33 U. S. C. 903 (A)

Section 903, Par. A:

Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not validly be provided by State Law.

Section 37 of New York Workmen's Compensation Law

Section 37 of the N. Y. W. C. L.:

Whenever used in this article:

1. "Disability" means the state of being disabled from earning full wages at the work at which the employee was last employed.

2. "Disablement" means the act of becoming so disabled as defined in subdivision one.

Article 1, Section 1 of the Constitution of the United States

Constitution of the United States—Article 1, Section 1:

"All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives".

Article 1, Section 8, Par. 18 of the Constitution of the United States

Constitution of the United States—Article 1, Sec. 8, Par. 18:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

Amendment V to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 308
305
346

October Term, 1954

Argued June 8, 1955 Decided July 19, 1955

Docket Nos. 23558
23216
23683

THE TRAVELERS INSURANCE COMPANY and
TODD SHIPYARDS CORPORATION,

Plaintiffs-Appellants,

against

FRANK A. CARDILLO, Deputy Commissioner, Federal Security Agency, Bureau of Employees' Compensation, Second Compensation District, and JOSEPH TROPEA,

Defendants-Appellees.

Appendix B.

IRA S. BUSHEY & SONS, INC.,
Plaintiff-Employer-Appellant,

and

AMERICAN POLICYHOLDERS' INSURANCE COMPANY and/or
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,
Plaintiff-Insurance Carrier-Appellant,

and

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Plaintiff-Insurance Carrier-Appellant,

and

THE STATE INSURANCE FUND,
Plaintiff-Insurance Carrier-Appellant,

against

THORLEIF JOHANSEN,
Defendant-Claimant-Respondent,

and

FRANK A. CARDILLO, Deputy Commissioner,
Second Compensation District,
Defendant-Resopndent.

Appendix B.

TODD SHIPYARDS CORPORATION, INC.,
Employer-Plaintiff-Appellant,

and

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Insurance Carrier-Plaintiff-Appellant,

against

UNITED STATES DEPARTMENT OF LABOR, BUREAU OF EMPLOYEES' COMPENSATION, Second District and FRANK A. CARDILLO, as Deputy Commissioner and RAYMOND LEBOWITZ,
Defendants-Appellees.

Before CHASE and MEDINA, Circuit Judges, and RYAN, District Judge.

Appeals from the United States District Court for the Eastern District of New York, Robert A. Inch, Judge.

Plaintiffs appeal from orders granting defendants' motions for summary judgment and denying plaintiffs' cross-motions in actions brought to review orders of various Deputy Commissioners awarding compensation under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 910 *et seq.* Opinions below not reported. Tropea award affirmed; Johansen and Lebowitz awards remanded to the District Court with directions to modify orders entered below.

Galli & Locker, New York City, (Urban S. Mulvehill, of Counsel) for plaintiffs-appellants, The Travelers Insurance Company and Todd Shipyards Corporation.

Appendix B.

Alexander & Ash, New York City (Sidney A. Schwartz, New York City, of counsel), for appellants, Ira S. Bushey & Sons, Inc., and American Mutual Liability Insurance Company.

Joseph Dean Edwards, New York City (Cornelius V. Gallagher and Paul Koch, New York City, on the brief), for Ira S. Bushey & Sons, Inc., Employer, and Hartford Accident & Indemnity Company, Insurance Carrier.

Bernard Katzen, General Attorney of The State Insurance Fund, New York City (Victor Fiddler and George J. Hayes, on the brief), for appellants, Ira S. Bushey & Sons, Inc., and The State Insurance Fund.

Joseph Dean Edwards, New York City (Cornelius V. Gallagher and Paul Koch, New York City, on the brief), for Todd Shipyards Corporation, Inc., Employer, and Massachusetts Bonding & Insurance Company, Insurance Carrier.

Leonard P. Moore, United States Attorney for the Eastern District of New York, Brooklyn, New York (Elliott Kahaner, Assistant United States Attorney) (Stuart Rothman, Solicitor of Labor, Ward E. Boote, Assistant Solicitor, and Herbert P. Miller, Attorney, U. S. Department of Labor, of Counsel), for Appellees Deputy Commissioners.

Irving Israel, New York City, By Leonard Taubenblatt, New York City, for appellees, Tropea, Johansen and Lebowitz.

MEDINA, Circuit Judge.

These are appeals from three separate orders entered by the United States District Court for the Eastern District

of New York granting defendants' motions for summary judgment, dismissing complaints in actions brought pursuant to 33 U. S. C. § 921 to review and set aside as "not in accordance with law" certain compensation orders made by the Deputy Commissioner in each case, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. § 901 *et seq.*) and denying plaintiffs' cross-motions for summary judgment.

Although the legal questions in all these cases are substantially the same, the factual situations vary somewhat and will be summarized separately.

Tropea Award

The record discloses that claimant Joseph Tropea's history of employment during the period preceding the filing of his claim for compensation was as follows:

"(1) September 3, 1942 to November 16, 1945, employed by Todd Shipyards Corporation.

(2) November 16, 1945 to July 29, 1948, unemployed, except for work at Rockaway Playland.

(3) July 29, 1948 to May 24, 1949, employed by Todd.

(4) May 24, 1949 to December 20, 1950, unemployed.

(5) December 20, 1950 to date, employed by Todd."

and that Todd Shipyards Corporation was insured by the following carriers during the relevant period:

"(1) 1940 to May 1, 1947, Fidelity and Casualty Company of New York.

(2) May 1, 1947 to May 1, 1949, Massachusetts Bonding and Insurance Company.

(3) May 1, 1949 to date, The Travelers Insurance Company."

Appendix B.

Claimant was employed by Todd as a sheet metal worker and throughout the various periods of employment "worked in noisy places, using a chipping gun with a great many chippers and riveters around." He first experienced difficulty with his hearing early in 1953, when he detected a temporary ringing. and in April or May of 1953 he began to notice some impairment in his ability to hear. As a result of the persistence of the impairment, claimant, on September 4, 1953, consulted an ear specialist, who, after examination, advised him that he had a permanent loss of hearing due to his employment and on September 30, 1953, a claim was filed with the Deputy Commissioner for compensation for occupational loss of hearing.

The Deputy Commissioner found that the claimant's occupational exposure resulted in permanent hearing impairment and constituted an injury; that the claim was timely filed from September 4, 1953, the date claimant had knowledge of permanent occupational loss of hearing; that although written notice of injury was not given within thirty days, the employer had knowledge of the injury and was not prejudiced by the lack of written notice; that claimant's average annual earnings at the time of his injury amounted to $4,600; that the period of employment with Todd Shipyards Corporation commencing on December 20, 1950, was the last employment in which claimant was exposed to injurious noises; and that nothing had been paid the claimant as compensation. In view of these findings, the Deputy Commissioner concluded that the employer in the last employment during which the injurious and cumulative effects of the occupational exposure manifested themselves is liable for the payment of compensation; that the Travelers Insurance Company, the carrier covering the employer during such last employment, is liable to discharge the duties and obliga-

tions of the employer in respect of such liability; and that as a result of the injury sustained claimant has a permanent partial disability equivalent to 6% binaural loss of hearing, for which he is entitled to 12 weeks' compensation at the maximum rate of $35.00 a week in the amount of $420.00

The only issue raised on appeal with respect to this claim is the appropriateness of the method used by the Deputy Commissioner in allocating liability to the employer and carrier involved.

Johansen Award

Claimant Thorleif Johansen was employed as follows:

"(1) April 1930-1940 employed by Ira S. Bushey & Sons, Inc. with the exception of a six month period in 1936.

(2) 1940-1942 employed by the United States Navy Yard in Brooklyn.

(3) 1942—date employed by Ira S. Bushey & Sons, Inc. with the exception of a one year vacation in 1946."

During claimant's periods of employment, Ira S. Bushey & Sons, Inc., was insured by the following carriers:

"(1) June 8, 1927 to June 1, 1953 American Policyholders' Insurance Company and/or American Mutual Liability Insurance Company.

(2) June 1, 1953 to September 9, 1953 Hartford Accident and Indemnity Company.

(3) September 9, 1953 to September 16, 1953 The State Insurance Fund."

Appendix B.

Johansen was employed variously as an iron worker, shipfitter and ship carpenter in the repair of vessels and was constantly exposed to loud noises. In December, 1952, claimant noticed recurring episodes of buzzing and ringing in his ears and in January or February, 1953, became aware of a loss of hearing which he thought was of a temporary nature. When no diminution of the impairment was perceived for several months, claimant, on September 16, 1953, went to an ear specialist, who, after examination, informed the claimant that he had a permanent loss of hearing due to his employment. On October 5, 1953, claimant filed a claim with the Deputy Commissioner to recover for such permanent hearing loss.

The Deputy Commissioner found that, as a result of his employment, claimant sustained occupational injury, consisting of permanent binaural impairment of hearing; that the injury arose naturally out of his employment; that although written notice of injury was not given within thirty days, the employer had knowledge of the injury and had not been prejudiced by lack of written notice; that the claim for compensation was timely filed within one year from the date when claimant first had knowledge of a permanent hearing loss due to his employment; that the claimant's average annual earnings at the time of his injury exceeded $2,730.00; and that nothing had been paid to the claimant as compensation. Accordingly, the Deputy Commissioner concluded that Ira S. Bushey & Sons, Inc., the last employer, in whose employment claimant was continuously exposed for eleven years, was liable for payment of compensation; that the insurance carriers who successively covered such liability of the employer during the period of claimant's last employment were jointly, equally and severally responsible for the discharge of the duties and obligations of the last employer in respect of such liability; and that, as a result of the injury sustained, claimant had suffered permanent partial disability equiva-

lent to 13.8% binaural loss of hearing compensable under the Longshoremen's and Harbor Workers' Act at the maximum rate of $35.00 a week for 27.6 weeks, or a total amount of $966.00.

The employer and the three insurance companies involved attack the award on various grounds. All contend that claimant is not entitled to any recovery under the statute in the absence of affirmative proof of impairment of wage earning capacity. Each of the insurance companies attacks the Deputy Commissioner's determination that all the carriers covering the claimant's last period of employment with Ira S. Bushey & Sons, Inc., were jointly, severally and equally liable; but each suggests a different formula which should be applied to these occupational disease compensation cases. Two of the companies assert, in addition, that the claim should be set aside for failure to give appropriate notice of injury and failure to file a claim within the time period specified by the statute.

Lebowitz Award

Claimant Raymond Lebowitz had been employed by Todd Shipyards Corporation as a marine electrician from 1942 to and beyond the time of the filing of this claim for compensation.

During this period of employment Todd was insured by the following carriers:

"(1) February 6, 1942 to May 1, 1947 Fidelity & Casualty Company of New York.

(2) May 1, 1947 to May 1, 1949 Massachusetts Bonding and Insurance Company.

(3) May 1, 1949 to August 22, 1953 Travelers Insurance Company."

Appendix B.

Throughout the time spent working for Todd, claimant was required to work around ships and was exposed to noises caused by riveting, hammering, chiseling and other industrial activities. In January 1953, claimant became aware of intermittent noises and ringing in his ears and on August 22, 1953, consulted an ear specialist who, after an examination, informed claimant that he had a permanent loss of hearing due to his employment. As a result, on September 16, 1953, claimant filed with the Deputy Commissioner to recover compensation for the permanent hearing impairment.

The Deputy Commissioner found that, as a result of his employment, claimant sustained occupational injury, consisting of permanent binaural impairment of hearing; that the injury arose naturally out of his employment; that although written notice of injury was not given within thirty days, the employer had knowledge of the injury and had not been prejudiced by the lack of written notice; that the claim was timely filed within one year from the date claimant first had knowledge of a permanent hearing loss due to his employment; that the claimant's average annual earnings at the time of his injury exceeded $2,730.00; and that nothing had been paid the claimant as compensation. The Deputy Commissioner thereupon concluded that Todd Shipyards Corporation, the last employer, in whose employment claimant was continuously employed for eleven years, was liable for the payment of compensation; that the insurance carriers who successively covered such liability of the employer during the period of claimant's last employment were jointly, equally and severally responsible for the discharge of the duties and obligations of the employer in respect of such liability; and that, as a result of the injury sustained, claimant had suffered permanent partial disability equivalent to a 15% binaural loss

of hearing compensable under the Longshoremen's and Harbor Workers' Act at the maximum rate of $35.00 a week for 30 weeks or a total amount of $1,050.00.

The only carrier on the risk during claimant's period of employment which appealed from the award is the Massachusetts Bonding and Insurance Company, the carrier from May 1, 1947 to May 1, 1949. The issues raised on this appeal are the same as those raised by the carrier-appellants in connection with the Johansen award.

Timeliness of Notice and Claim

Appellants' contentions that the Johansen and Lebowitz claims are barred because they were not filed within one year from the date of the "injury" and because written notice was not given the respective employers within thirty days from that date, are wholly without merit. With regard to the requirement of notice, the Deputy Commissioner made specific findings that the employers had knowledge of the injury and that they were not prejudiced by the failure to give written notice. Under the applicable statutory provision, such findings exempt these claims from the bar which otherwise might exist (33 U. S. C. §912(d)). The attack upon the Deputy Commissioner's findings that the claims were filed within one year from the date of the "injury" is based upon the supposition that, in occupational disease cases, the date of "injury," within the meaning of the applicable statute of limitations, is some date earlier than that upon which the cumulative effects of exposure manifest themselves. In support of the latter contention, reliance is placed upon cases involving "accidental" injury in which a distinction is drawn between the specific date upon which the injury is actually inflicted and the date upon which the extent of the disabling effects of the injury becomes apparent. Although it may well be

that the Congress intended that one injured in an industrial accident occurring at an identifiable time and place who, presumably, could be expected to know that he was hurt, even if, at the time, he was unaware of the extent of the disablement resulting from his injury, should be required to file a claim within one year from the date of the accident, it seems perfectly clear that a different criterion necessarily must have been contemplated in cases of occupational disease. Every claim based upon occupational disease would be barred if the one year limitation period were declared to begin running when contact is first had with the condition causing the disease or when the disease first ensues. At such a time, a potential claimant would have no occasion to realize that there is anything wrong with him, much less that he had suffered damage industrially caused. The Supreme Court has recognized the absurd effects which would result from the application of such a rule in occupational disease cases and has held, in an analogous situation arising under the limitation provisions of the Federal Employer's Liability Act, that an "employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves." *Urie* v. *Thompson,* 337 U. S. 163, 170 (1949). Since the fact that the various claims presently before us were filed well within a year of the "date of manifestation" is undisputed, we conclude that they are not barred by the statute of limitations.

Impairment of Earning Capacity

The contention is made that affirmative evidence of a diminution in wages or in wage earning capacity directly attributable to the claimed injury is indispensable to recovery under the Act. It is urged that since the claimants herein were able to continue at their customary jobs, they

had not sustained disabling injuries which are compensable. Appellants realize that, in order to maintain their position, it is incumbent upon them to demonstrate that even in the case of "schedule losses" it must be essential to show specific loss of wages, or that the injuries involved are not properly treated as "schedule losses", under 33 U. S. C. § 908 (c) 13, but should be treated as fitting within the category of "other cases," in which awards are based upon the difference between the average weekly wage before the injury and the claimant's wage earning capacity after the injury, 33 U. S. C. § 908 (c) 21. It is thus argued that "schedule losses" apply only to "accidental" injuries or injuries resulting from "trauma" and do not apply to injuries resulting from occupational disease. It is also asserted that this court, in stating that "schedule losses" were bottomed on a concept of impairment of wage earning capacity (*Iacone* v. *Cardillo,* 208 F. 2d 696 (CA 2, 1953)), impliedly held that affirmative proof of impairment must be introduced by claimant, even in such cases. Neither argument is persuasive. Nowhere in the statute did the Congress limit the applicability of the schedules to injuries resulting from accident or trauma. Little support can be gleaned from the state statutes in effect at the time the Federal Act was passed, for they differed markedly in some respects from the Federal Act. Thus, in 1927, when the Longshoremen's Act was passed, the New York Workmen's Compensation statute, which was used in planning the format of the Federal Act, did not treat recovery for occupational disease with the breadth of view which the Congress later chose to adopt. It is apparent that the Congress, in defining "injury" under the Act to include "occupational disease" as well as "accidental injury", intended that the two should be treated similarly, unless otherwise specified in the Act, or unless the nature of the two kinds of "injury" rendered it impracticable to accord

similar treatment to each. Nothing in the nature of the "schedule losses" specified in 33 U. S. C. § 908 (c) indicates a necessity to treat loss of hearing resulting from accident any differently from loss of hearing resulting from occupational disease. Indeed, were we to hold otherwise, we would be sanctioning a rule under which identical impairments would be given disparate treatment under the Act, *viz.*, one injury would be compensable as a schedule loss if it resulted from accident and the other would not, simply because it arose out of the insidious effects of an occupational disease. This could hardly have been the intention of the Congress.

Having concluded that the statutory schedules apply to "injury" resulting from occupational disease, it remains for us to point out only that, in the case of schedule losses, the Congress has determined that a loss of wage earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment. The situation presented in the *Iacone* case, *supra,* is distinguishable. In that case, the use of the eye was lost long prior to the industrial accident upon which the claim was founded, and, consequently, we stated that "Industrially, claimant lost nothing by the second injury." In effect we held that the Congress did not contemplate compensation for the loss of a previously sightless eye when it made provision for scheduled awards in 33 U. S. C. § 908 (c) (5). In the cases presently before us, there was ample evidence to sustain the Deputy Commissioner's findings of permanent binaural impairment of hearing arising naturally out of the claimant's employment and, consequently, the schedule loss formula provided for in the statute was properly invoked in accordance with the apparent Congressional intent conclusively to fix compensation for permanent partial loss of hearing.

Appendix B.

Allocation of Liability

The most difficult question presented by these cases is not that of a claimant's right to recover but rather that of determining upon whom shall devolve the burden of paying the tariff imposed by this socially desirable legislation. The nature of occupational diseases and the dearth of medical certainty with respect to the time that is required for them to develop and the permanence and extent of the resultant injurious effects at different stages of the diseases' evolution, makes it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences. Realizing this difficulty, and in the absence of a specific legislative provision indicating an appropriate method for allocating liability, the various Deputy Commissioners sought a formula which they believed would be administratively feasible and would at the same time effectuate the beneficial purposes of the act. The method selected was that used in these three cases, namely, holding "the employer in the last employment during which the injurious and cumulative effects of the occupational exposure manifested themselves" principally liable, and holding "the carrier or carriers covering the employer during such last employment jointly, severally and equally responsible for the discharge of the duties and obligations of the last employer in respect of such liability." Until these cases arose, carriers in similar situations had consented to the application of this formula. It is clear, however, that previous administrative practice has, at most, persuasive effect, and that acquiescence in similar cases does not preclude questioning the practice at this time. Moreover, the record discloses that several of the carriers involved here never before consented to the use of this method for allocating liability.

Thus appellants suggest various formulae which, collectively, include almost every alternative approach to the solution of the problem, running the gamut from full scale medical inquiry into all prior employments which may have fostered the development of the disease and attempting to apportion liability to each employer along the line, the carriers covering such employers during the periods in and to which claimants were so exposed, to holding the employer during the employment in which the injurious effects manifested themselves and the carrier with whom the employer carried his insurance at that time. Each of the suggested alternatives has advantages and disadvantages and, in view of the present state of medical knowledge relating to these diseases and the administrative obstacles confronting those charged with the initial responsibility for passing upon these claims, it would be sheer folly to seek or expect to discover a formula devoid of any possibility of inequity or seeming injustice.

But, our problem is not one of choice but rather, primarily, one of legislative interpretation and in the absence of any reference in the statute to the precise point, we must examine the legislative history for such light as it may afford. That the Congress was not unaware of the difficulty that might arise with respect to occupational disease seems clear. During the course of the hearings which preceded the passage of the Act, an employer representative suggested that the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a "last employer" would be liable for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that "last em-

ployment.'"[1] Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered; and it would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that the Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

There remains the question, which carrier or carriers are responsible for the discharge of the duties and obligations of the "last employer" in respect of his principal liability. Here we are frankly groping in the dark. But the conclusion already arrived at with respect to the liability of the employer may fairly be thought to mark the path to be followed here as well. If administrative ease of handling was a consideration of significance in the formulation of the Act with reference to the liability of the employer, then there is small reason to suppose that it was the intention of the Congress to inject into the determination of carrier liability the very same conjectural and unsatisfactory estimates which would have been involved in attempting to apportion liability among employers. Nor can it be argued with any persuasive effect that the Congress, in charging the "last employer" was concluding, as matter of law, that the disability resulted solely, or even primarily, from the exposure during the period of last employment so that it would follow, as a

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[1] Hearing of Committee on the Judiciary of the House of Representatives, on H. R. 9498, 69th Congress, 1st Sess., held April 8, 15, 22, 1926.

natural consequence, that all carriers insuring the "liable" employer during the "last employment" should, in some manner, be required to share responsibility for the employer's liability. There is no basis for attributing so fictional and unrealistic a view to the legislature. Rather, it would seem far more in keeping with the Congressional recognition of the over-riding importance of efficient administration in this area, to conclude that the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the "liable" employer during the claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the "liable" employer. We so hold.

Accordingly, the order entered in connection with the Tropea claim is affirmed and the cases involving the Johansen and Lebowitz claims are remanded to the District Court with directions to modify the respective orders in accordance with the views expressed herein.

Judgment

COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of July one thousand nine hundred and fifty-five.

Present:

Hon. HARRIE B. CHASE,
Hon. HAROLD R. MEDINA,
Circuit Judges,
Hon. SYLVESTER J. RYAN,
District Judge.

IRA S. BUSHEY & SONS, INC.,
Plaintiff-Appellant,

v.

FRANK A. CARDILLO, etc., and THORLIEF JOHANSEN,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is remanded in accordance with the opinion of this Court.

A. Daniel Fusaro,
Clerk

By
Ralph C. Curcio
Deputy Clerk